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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. [redacted] 15

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,
Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 831

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

BRIEF OF RESPONDENTS.

I.

COUNTER STATEMENT OF MATTERS INVOLVED.

(A) Statement of Facts.

Respondents accept the statement of facts as set forth in the petition as being, in the main, correct, except for the following corrections therein or amplification thereof:

Each of the proofs of claim presented to the Special Master by the Respondents is a claim *ex contractu* (R. pp. 4, 6, 11, 15 and 79), while each cause of action set forth in the so called ancillary bill against the Respondents is an action *ex delicto*. The sole relief sought

against each of the Respondents is a decree *in personam* for the payment of moneys. Accountings are only sought for the purpose of ascertaining the damages alleged to have been sustained by reason of the alleged unlawful acts of Respondents. The alleged wrongful acts and the relief sought are as follows:

One. The taking of moneys by Respondents, Hillman, Sheets and Watson, during the period from May 1920 to October 1933 under the guise of salaries as officers of Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill"), Tower Hill Connellsville Coke Company of Pennsylvania (hereinafter called "Tower Hill of Pennsylvania"), and Eastern Coke Company (hereinafter called "Eastern"), (R. pp. 50 and 51). The relief sought is a decree for an accounting and payment of these moneys by Respondents (R. p. 62).

Two. The purchase of 11,840 shares of capital stock of Emerald Coal and Coke Company, for which the sum of $1,184,000.00 was paid by Tower Hill on the ground that the expenditure of said funds was a misappropriation of the moneys and assets of Tower Hill made for the monetary gain and advantage of Hillman and constitutes mismanagement of the corporate affairs of Tower Hill of a fraudulent character. (R. pp. 51-53). The relief sought is a decree against Respondents, Hillman, Sheets and Watson and each of them for the payment of the sum of $1,184,000.00, with interest on the surrender by the Petitioners of the said shares of stock. (R. pp. 62 and 63).

Three. Improvident and fraudulent waste and misappropriation of the funds of Tower Hill, Tower Hill of Pennsylvania and Eastern by means of a pool arrangement by which the Respondent, Hillman Coal and Coke Company, apportioned and allocated certain office, over

head and engineering expense among various corporations with which it was connected or affiliated, including the said three named companies, and the operation of Tower Hill and its said subsidiaries as mere departments of Hillman Company, in consequence of which wrongdoing, negligence and failure Tower Hill and its said subsidiaries lost large sums of money. (R. pp. 53-57, inclusive). The relief sought is that the Respondents, Hillman, Sheets and Watson and Hillman Coal and Coke Company account for all moneys received and retained by Hillman Company from Tower Hill and its said subsidiaries, by reason of the said pool arrangement, for all coke produced and manufactured from the property of Tower Hill and its subsidiaries during the period from April 1920 to October 1933, and the proceeds of said sale or other disposition thereof, and that the Respondents and each of them be decreed to pay to Petitioners, all such moneys as upon said accounting may be adjudicated to be due and owing to Tower Hill or the Petitioners. (R. p. 63).

Four. The exchange by Tower Hill of Pennsylvania of 178.4 acres of coal to Redstone Coal and Coke Company for property known as Thompson-Connellsville No. 1 Plant of Redstone, which is alleged to have been caused by Hillman through his control of Tower Hill of Pennsylvania, for the purpose of benefiting Hillman and Hecla Coal and Coke Company, Respondent, and grossly improvident expenditures in taxes, maintenance and improvements of Thompson-Connellsville No. 1 Plant brought about by the fraud of Hillman, Sheets and Watson in imposing said property on the Tower Hill of Pennsylvania. (R. pp. 59-62). The relief sought is that Respondents, Hillman, Sheets and Watson and Hecla Coal and Coke Company and each of them be decreed to pay to Petitioners, the sum of $356,800.00, with interest, the

alleged value in cash of the 178.4 acres traded by Tower Hill of Pennsylvania with Redstone in exchange for the said Thompson-Connellsville No. 1 property, upon conveyance by Petitioners of said property to such person or persons as the Court may direct and for an accounting for all moneys expended for taxes upon and the operation and maintenance of said property, and the repayment to Petitioners of all such sums, less such moneys as have been received heretofore by Tower Hill and/or Tower Hill of Pennsylvania for coke produced or manufactured from the said Thompson-Connellsville No. 1 property. (R. pp. 63 and 64).

On presentation of the so called ancillary bill, the Court ordered the same to be filed, with leave to the defendants therein named, however, to move to dismiss, to answer, or make such other defense thereto as might be proper, the order reciting:

> "4. All questions as to the jurisdiction of this Court and other questions are reserved by this Court for future decision as such questions may arise, and nothing is herein decided except that the bill shall be filed and notice thereof be had as directed above". (R. p. 22).

(B). History of Case In Lower Courts.

Upon the affirmation of the decree of the District Court in the case of *Piedmont Coal Company, et al. v. Tower Hill Connellsville Coke Company of West Virginia*, adjudicating that its business and affairs be terminated and wound up, its property and assets sold and converted into money and distribution made to its creditors and stockholders and appointing the Petitioners Receivers for said purpose, with full power to institute and prosecute either in their own name or through Ancillary Receivers all suits necessary to recover possession

of all and singular of the said property and assets, an Order of Reference was thereupon made to a Special Master to ascertain the creditors and stockholders of Tower Hill and their respective rights and priorities. (R. p. 1).

The Respondents, none of whom were parties to the original cause, or had intervened therein, pursuant to the said Order of Reference, at a hearing held by said Special Master appeared and presented their Proofs of Claim, four of them as creditors and the fifth as a stockholder, and certain testimony was taken on some of said claims. Each of said claims remains pending and undetermined. (R. p. 79).

Thereupon the Receivers of Tower Hill, Petitioners, tendered and asked leave to file the so called ancillary bill of complaint against the Respondents (R. p. 46), wherein they set forth that at the said hearing held before the Master, the Respondents had each appeared and made proof of their said claims, setting forth also the nature and amounts thereof, and denied the validity of said claims and alleged that they had certain claims against each of the Respondents, the nature of which has been already stated in the counter statement of facts. Each of said claims set up by the Receivers is, as heretofore stated, a claim for money damages arising out of an alleged cause of action *ex delicto*. Most of the said causes of action, as Northcott, J. in his opinion says appear not to have grown out of transactions which were the basis of claims filed by the Respondents with Receivers, but constitute independent claims in behalf of the Receivers against the claimants. (R. p. 79). Each of the prayers of the said bill was a prayer for affirmative relief against the Respondents on the causes of action therein asserted against them, which constitute counter claims to the claims filed with the Receivers and not mere defenses thereto, (R. p. 80), and all of said alleged

causes of action constitute causes of action at law upon which the Respondents have the right of trial by jury and are not cognizable in equity, as Petitioners assume. The Respondents thereupon appeared specially by their attorneys for the sole purpose of raising the question of the jurisdiction of the Court and none other, and moved to vacate the said order directing that the said bill be filed and to quash the service thereof upon them, on the ground that each of the individual Respondents was at the time of the filing of the said suit and always since has been a citizen and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth and each of the corporate Respondents is a corporation incorporated and existing under the Laws of the Commonwealth of Pennsylvania, with its domicile in the City of Pittsburgh in said Commonwealth, and a citizen, resident and inhabitant of the said Commonwealth within the purview of Section 51 of the Judicial Code of the United States (U. S. Tit. 28, sec. 112) with respect to venue. (R. p. 21) In the proceedings entitled No. 3370 in Equity in the said District Court, to which Number the said ancillary bill is filed, each of said Respondents also appeared specially, for the sole purpose of questioning the jurisdiction of the Court and moved to quash the service of and dismiss the said bill for want of jurisdiction on the same ground as that alleged in the motion to vacate the Order of Court filed in this case directing that the said bill be filed.

The District Court held that as the said bill was for the purpose of collecting large sums of money from the Respondents that the Court had no jurisdiction over the Respondents to grant the affirmative relief prayed for therein and entered a decree sustaining Respondents' motion to vacate its order in this case directing

the bill to be filed (R. p. 25), and also entered a decree in the case at No. 3370 in Equity, dismissing the said ancillary bill.

Upon appeals taken by the Receivers from each of said decrees, the Circuit Court of Appeals held that both appeals presented the same question, viz., the correctness of the order dismissing the bill (R. p. 80) and further held that the District Court was correct in holding that it had not acquired jurisdiction to award any affirmative relief thereon against the Respondents. The Circuit Court of Appeals, however, held that the District Court did have jurisdiction to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the Receivers and to stay action upon those claims until the counter-claims asserted in the ancillary bill could be adjudicated in a court of competent jurisdiction, so that they could be set off against the claims, or the amounts payable thereunder. (R. p. 85).

The Court in its opinion says

"We think, therefore, that, instead of dismissing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until the counter-claims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counter-claims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counter-claims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of de-

fense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counter-claim or counter-claims in a court of competent jurisdiction." (R. p. 85).

The opinion of the Circuit Court of Appeals is reported in 75 Fed. (2nd) p. 451, Advance Reports.

(C) Statement of Question Presented.

Where a Federal District Court which has appointed Receivers to wind up the affairs of a solvent corporation appoints a Master under an Order of Reference to receive Proofs of Claims of creditors and stockholders, and where non-resident claimants, not parties to the Primary Cause, pursuant to said Order, appear before said Master and present their Proofs of Claim, does such action make them parties to said Primary Cause and subject them to the jurisdiction of said Court in a proceeding thereafter instituted by the Receivers against them in said Court on a Bill of Complaint wherein the Receivers seek affirmative relief to recover money damages on alleged causes of action sounding in tort?

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Respondents submit that the reasons relied on by Petitioners for allowance of this writ are insufficient to warrant this Court in the exercise of its discretion to grant the same.

Respondents further submit that their counter-statement of the question presented is a more accurate statement thereof than that contained in the Petitioners' brief as appears from the following excerpt from the opinion of Northcott, J.:

> "The question involved is not one as to the jurisdiction of the court over the causes of action asserted in the ancillary bill, for it is well settled that the courts of the United States have jurisdiction to entertain, either in equity or at law as may be appropriate, ancillary proceedings in aid of a receivership suit pending in a federal court, even though other elements of federal jurisdiction, such as diversity of citizenship or the jurisdictional amount, may be lacking. *White v. Ewing,* 159 U. S. 36; *Pope v. L. N. & A. C. R. Co.,* 173 U. S. 573; *Kirkland v. Knox,* 230 Fed. 860; *Carey v. McMillan* (C.C.A., 8th); 289 Fed. 380; *Hart v. Wiltsee,* 19 Fed. (2d) 903; *Hume v. City of New York,* 255 Fed. 488; *Peck v. Elliott,* 79 Fed. 10. *The question is whether the court acquired such jurisdiction over the persons who filed claims with the receivers as would authorize the granting of relief against them on counter-claims on which affirmative personal relief was asked and which were not mere defenses to the claims filed; and we think it clear that this question must be answered in the negative.*" (R. pp. 80 and 81).*

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* Italics ours throughout this brief unless otherwise noted.

The Petitioners assign three reasons for the allowance of the writ, viz.

(a) The question at issue in this case has never been decided in this Court.

(b) It affects materially the prompt and equitable administration of Receivership estates; and

(c) It involves the application of Equity Rule 30.

(a) THE NOVELTY OF THE QUESTION.

The question reduced to a very narrow compass may be adequately paraphrased as follows:

Must an inhabitant of the State of Maine forego filing his claim as a creditor of a corporation for whom a Receiver in a Federal District Court in Equity in the Southern District of California has been appointed, for fear that the California Court will assume jurisdiction over him in any suit which its Receiver may thereafter see fit to institute against him, on the ground that by filing his claim he has waived his right under Section 51 of the Judicial Code (U.S.C.A. Title 28, Sec. 112), to be sued in the District of Maine where he is an inhabitant?

That the precise question here involved may not have been decided by this Court is not necessarily a reason for its consideration now. On the contrary, this fact raises a presumption that during the long period in which receivership cases in great number have been prosecuted in the Federal Courts no one has considered tenable the contention of the Petitioners herein. And adjudications of the controlling principles, supporting the action of the District Court and the Circuit Court of Appeals herein, are found in the decisions of this and other courts of the United States in considerable and sufficient number.

The Circuit Court of Appeals clearly states the position of the Petitioners in this case as follows:

"The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill." (R. p. 81).

The Court also makes the following answer thereto:

"The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C.C.A. 4th) 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones v. Laughlin & Sands* (C.C.A. 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 108 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 195; Clark on Receivers, Vol. 1, p. 717." (R. p. 81.)

(b) THE EFFECT OF THE DECREE COMPLAINED OF UPON THE PROMPT AND ORDERLY ADMINISTRATION OF EQUITY RECEIVERSHIP ESTATES.

In answer to this contention, we respectfully submit:

(1) Such a reason is not sufficient to warrant the Court in disregarding the provisions contained in Section 51 of the Judicial Code (U.S.C.A. Title 28 Sec. 112) which, subject to the exceptions therein set forth, none of which are applicable to this case, prohibits suits from being brought in any District Court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant.

(2) The prompt and orderly administration of an equity receivership estate is no more affected or interfered with by a suit brought against a non-resident defendant in a district whereof he is an inhabitant than is a suit, whether at law or in equity, in the District Court wherein the receivership estate is being administered. In each case the defendant is entitled to his day in Court and the case takes its course without regard to the administration of the Receivership. Particularly is this true where the defendant has the right to a trial by jury.

(3) In the case at bar the Circuit Court of Appeals has made adequate provision to the end that the orderly administration of the receivership may be effected and the rights of all parties interested therein preserved by modifying the decree of the District Court and decreeing that the Ancillary Bill be treated as a petition to stay action on the claims of the Respondents pending the adjudication of the counter-claims of the Receivers in a Court of competent jurisdiction.

(c) THE APPLICATION OF EQUITY RULE 30.

A complete answer to the Petitioners' claim that the question at issue involves the application of Equity Rule 30 is found in the following excerpt from the opinion of Judge Northcott:

> "The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counter-claim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; *Texas Co. v. Borne Scrymser Co.* (C.C.A. 4th) 68 Fed. (2d) 104; and *General Electric Co. v. Marvel Rare Metals Co.* 287 U. S. 430, in the last of which the Supreme Court said: 'The setting up of a counter-

claim against one already in a court of his own choosing is very different, in respect to venue, from haling him into that court.'

"One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no option whatever. Unless he promptly files his claim with the court which has taken jurisdiction of the property, his right to share in the distribution of that property will be gone; and that court passes upon his claim, without regard to citizenship, the amount involved, or other jurisdictional requirements, merely because of the necessity arising out of the fact that it has taken possession of property. The claimant in such case files his claim in the receivership suit in order that he may obtain his equitable portion of the property in receivership upon its distribution by the court; and, as we said in a former opinion herein, he makes himself a party to the cause *pro hac vice,* i. e., merely for the purpose of having his claim allowed and of sharing in the distribution of the property in which he claims an interest because of the receivership. He has an equitable interest in the property which is in the hands of the receiver; and his position, in so far as coming into the receivership suit for the assertion of his

rights in concerned, is more nearly analogous to that of a person whose property has been attached, and who must appear and defend for the protection of his interest in the property, than to that of a complainant who has voluntarily gone into a court and filed a bill in equity. To permit the receiver to assert in the receivership suit an independent cause of action at law or in equity against such claimant, or to recover on a counterclaim against him merely because he has filed his claim in the receivership suit, would be as unfair as to permit a plaintiff in an attachment suit to amend his complaint to allege a new and different cause of action against a defendant in attachment, or to permit a non-resident, who has appeared to defend a suit on one cause of action, to be subjected while in the jurisdiction to suit on another and independent cause of action. It is well settled that, in an attachment suit, it is not permissible to amend the pleadings to set up a new cause of action (6 C. J. 482), and that one who comes into the jurisdiction of a court for the protection of his interest in litigation there pending is immune from service of process in another suit. *Page Co. v. McDonald,* 261 U. S. 446; *Stewart v. Ramsey,* 242 U. S. 128." (R. pp. 83 and 84).

Further, as Judge Northcott in his opinion says, and an examination of the ancillary bill discloses, the causes of action alleged therein are not cognizable in equity, but constitute causes of action at law, and Equity Rule 30 has no application thereto.

III.

ARGUMENT.

(1) The Issue Involved In Its Last Analysis Resolves Itself Into One of Venue.

Section 51 of the Judicial Code (U. S. C. A. Title 28, Sec. 112), contains the following provision:

> "'(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;"

The exceptions to the prohibition upon bringing any person before a District Court by any original process or proceding in any other district than that whereof he is an inhabitant, as found in Sections 52 to 57, both inclusive, of the Judicial Code, (U. S. C. A. Title 28, Secs. 113 to 118), do not apply to a proceeding such as the one now before the Court, for the reason that the so-called Ancillary Bill does not affect any property within the Southern District of West Virginia, no real property within the said territorial district is mentioned in the said Bill and the proceeding is not in the nature of an attachment of any property of Respondents within said district.

(2) The Proving of Claims Before a Special Master to Whom an Order of Reference Has Issued in a Receivership Proceeding Does Not Make the Claimant a Party to Such Receivership Proceeding.

As stated by Judge Northcott in his opinion:

"* * * under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C. C. A. 4th), 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones v. Laughlin & Sands* (C. C. A. 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 108 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 195; *Clark on Receivers*, vol. 1, page 717." (R. p. 81)

(3) The Ancillary Bill is Not a Purely Dependent Bill. It is an Original Bill Against the Respondents and Hence Requires the Service of Original Process.

No argument is necessary in support of the proposition that the issues involved in the Primary Cause at No. 1434 in Equity, wherein the Piedmont Coal Company, et al., are Plaintiffs and the Tower Hill Connellsville Coke Company of West Virginia is Defendant, and the issues involved in the Secondary Cause at No. 3370 in Equity in the District Court wherein the Petitioners are Plaintiffs and the Respondents Defendants are essentially different. The Bills therein filed are against different parties and the Respondents, Defendants in the Bill at No. 3370 in Equity, were not parties to the Bill at No. 1434 in Equity. In the latter case, 64 Fed. (2d) 817, the Court held that for the purposes of the decree, Tower Hill of West Virginia was the only indispensable

party. The issues in the two cases are entirely different. In the case at No. 1434 in Equity the fundamental issue was whether the rights of the preferred stockholders were so imperilled by the management of the defendant company as to warrant the appointment of a receiver to wind up its affairs. The issues raised by the Bill at No. 3370 in Equity are whether the individual Respondents, Hillman, Sheets and Watson and the two Respondent corporations are liable to Tower Hill in damages by reason of their dealings with it. The causes of action alleged in said Bill are not only the acts of fraud and mismanagement averred in the former Bill but are based on other actions not theretofore complained of.

Northcott, J., in his opinion says:

"And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties is an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. *Dunn v. Clark,* 8 Pet. 1; *Smith v. Norfolk,* 115 U. S. 143, 148; *G. & C. Merriman Co. v. Saalfield,* 241 U. S. 22; *Manning v. Berdan,* 132 Fed. 382; *Bowers v. Christian,* 16 Fed. 729; *Hart v. Wiltsee, supra.*" (R. p. 81.)

(4) Respondents Are Not Amenable to the Service of Process of the Ancillary Bill Under Section 51 of the Judicial Code.

(a) The right of a defendant to be sued in his own district in any civil suit is absolute. In *Munter v. Weil Corset Co.*, 261 U. S. at 279, 67 L. Ed. 654, this Court says:

> "The service on Munter was void. *The district court of Connecticut had no power to send its process to New York for service. Toland v. Sprague,* 12 Pet. 300, 330, 9 L. Ed. 1093, 1105; *Herndon v. Ridgway,* 17 How. 424, 15 L. Ed. 100; *New York L. Ins. Co. v. Bangs,* 103 U. S. 435, 26 L. Ed. 580."

(b) Respondents have not waived their personal privilege to be sued in the district whereof they are inhabitants.

The personal privilege of a non-resident defendant to insist upon suit being brought against him and the service of process upon him in the district whereof he is an inhabitant may only be waived if he appears and pleads to the merits of the *particular* bill or suit in which he is named defendant.

Grable v. Killits, 282 Fed. 185, 195;
Citizens Savings & Trust Co. v. Illinois Central Railroad Co., 205 U. S. 46, 51 L. Ed. 703;
Big Vein Coal Co. of W. Va. v. Read, 229 U. S. 31, 57 L. Ed. 1053;
Pacific Mutual Life Ins. Co. v. Tompkins, 101 Fed. 539 (C. C. A. 4th Cir.).

Respondents insist, moreover, that they were not, as Petitioners contend, "actors" in any sense of the word at any time in any of the proceedings which were insti-

tuted in the Court below. The presentation of the Respondents' claims to the Special Master was by virtue of the Order of the Court directing them, among other creditors and stockholders, to submit their claims to the Master within a very limited time under penalty of thereafter being barred from participating in the distribution of the assets of the defendant corporation. They were in this respect not movants but persons who, by virtue of the Court's order, were in a position analogous to that of a defendant against whom suit is brought and who must appear and defend to prevent a judgment in default. The order compelled them to file their claims, with proof thereof, before the Special Master, at the place and time designated by him or forfeit the same.

The answer to the Petitioners' argument that Respondents were in a Court "of their own choosing" and therefore that the cases of *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408; *Thames & Mersey Marine Insurance Co. v. United States*, 237 U. S. 19; 59 L. Ed. 821 and *Burnrite Coal Briquette Co. v. Riggs*, 274 U. S. 208; 71 L. Ed. 1002, are applicable is conclusively stated by Northcott, J., in his opinion, (R. pp. 83 and 84) from which we have already quoted, (pages 13 and 14 hereof).

The following language from *Read v. Neff, et al.*, 207 Fed. 890, is particularly appropriate.

> "This court is open to all litigants who can make averment of jurisdictional facts. He had the perfect right to come to this court and look after his case, aid in the management thereof and give his testimony. This is not denied. ***But it is contended that if he did elect to come, he must come with a club over his head, terrorizing both him and all***

> *other litigants of like position. This is unsound and utterly at variance with the undoubted right of all such litigants to personally present their case, either alone or with the aid of lawyers. And, if litigants coming from another state come at the peril of being sued, many would not come."*

Petitioners would extend the appearance of these Respondents before the Special Master *pro hac vice* to a general appearance entered in the District Court in any and all cases that the Petitioners might see fit thereafter to bring against them. They would make the filing of the proofs of claim before the Master operate as a blanket waiver of Respondents' privilege to immunity from service of process before they knew that they might at some future date be placed in a position where they should avail themselves of their right. We submit that the Respondents may not be so lightly divested of their right and that this Court will look with no more favor than did either the District Court or the Court of Appeals on the Petitioners' contention.

(c) Equity Rule No. 30 has no application.

The same reasoning that denies the contention that parties filing claims with a receiver or before a master upon a reference make themselves parties to the original cause, refutes the contention (Petitioners' brief p. 11) that such claims "are in essence bills in equity." A reference to a master for the purpose of ascertaining the parties entitled to the proceeds realized upon the winding up of a corporation is merely a part, and only a part, of the process of execution of the final decree in the original suit, and the filing of claims, which must be filed to preserve the claimant's rights, whether his claims are legal or equitable, presents no analogy to the bringing of

a suit in equity. The claimants are brought into a forum not of their selection, for a special and limited purpose, upon penalty of forfeiting their claims by non-appearance, and are compelled to prosecute such claims in a court of equity without regard to whether such claims be legal or equitable in their nature. They have no choice in respect of either procedure or forum. We believe that the opinion of Northcott, J., and what has been hereinbefore said fully answers the Petitioners' argument on this point.

Moreover, this Court has repeatedly held in a long line of cases that Equity Rule 30 was not intended to change in any respect the line of demarcation between law and equity, as drawn by the Federal Statutes and Decisions. That such is the law clearly appears from that omitted portion of the opinion of the late Chief Justice Taft in *American Mills Co. v. American Surety Co. of New York,* 260 U. S. 360, at 364, 67 L. Ed. 306, at 309 from which Petitioners have quoted (Petitioners' Brief p. 10) in their effort to show that Equity Rule 30 should be invoked in this case. We give in italics the omitted portion of said paragraph which is indicated by asterisks in the Petitioners' Brief, in the following quotation from Chief Justice Taft's opinion:

> "The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. *But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the Federal statutes, practice and decisions when the rules were*

promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure, as between the law and equity sides in such cases, always has been that the equity issue is first disposed of by the chancellor, and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the 7th Amendment of the Constitution. Liberty Oil Co. v. Condon Nat. Bank, decided November 26, 1922 (260 U. S. 235, ante, 232, 43 Sup. Ct. Rep. 118). Petitioner's construction of Rule No. 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it; but this would be futile."

Petitioners contend that all counterclaims asserted against the Respondents in the ancillary bill are of a character cognizable in equity and that therefore no right of trial by a jury is involved. They further claim that this fact seems to have been overlooked by the Circuit Court of Appeals. That the said causes of action constitute causes of action at law for which Petitioners have a plain, adequate and complete remedy and in which the Respondents have their constitutional right of a trial by jury and are therefore not cognizable in equity is, we submit, clear from an examination of the said claims, the nature of which we have hereinbefore analyzed (pp. 1 to 4 hereof). That the Cir-

cuit Court of Appeals had a clear understanding of the nature of the counterclaims and that this phase of the case was not overlooked by it but, on the other hand, that the said Court had fully considered all of the alleged causes of action set forth in the ancillary bill appears from the following excerpt from the opinion of Northcott, J., wherein he says:

> "In so far as the matters set up in the ancillary bill constitute *causes of action at law,* there is an additional reason why they may not be asserted in the receivership suit. That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would necessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.,* 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.* (C. C. A., 4th), 55 Fed. (2d) 42, 47." (R. pp. 84 and 85.)

We submit that no extended citation of authorities is necessary in support of the proposition that, under the Seventh Amendment to the Constitution and Section 367 of the Judicial Code (U. S. C. A. Tit. 28, Sec. 384), suits in equity are prohibited in any Court of the United States where a plain, adequate and complete remedy may be had at law. This Court in a long line of cases has so held: *Buzard v. Houston,* 119 U. S. 347 at 351; *Scott v. Neely,* 140 U. S. 106 at 110, 35 L. Ed. 358;

United States v. Bitter Root Development Co., 200 U. S. 451, 472, 50 L. Ed. 550, 560; *Curriden v. Middleton*, 232 U. S. 633 at 636, 58 L. Ed. 765, 767; *Schoenthaw v. Irving Trust Co.*, 287 U. S. 92, at 94 and 95, 77 L. Ed. 185, at 187 and 188.

We further submit it is equally clear from the foregoing authorities that Equity Rule 30 can have no possible application to a case such as the one at bar where advantage is sought to be taken of said rule to defeat the Respondents' constitutional right of trial by jury, as well as their immunity from service of process under the provisions of Section 51 of the Judicial Code (U. S. C. A. Title 28, Section 112) prohibiting the bringing of suit against any person in any other district than that whereof he is an inhabitant.

WHEREFORE, it is respectfully submitted that the writ of certiorari should be denied.

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